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Supreme Court, U. S.
FILED
JUL 10 1972

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1382

IN THE INTEREST OF
THOMAS ANDREW SCHROUD, A JUVENILE:
BARBARA SCHROUD,
*Petitioner,*

*vs.*

MILWAUKEE COUNTY DEPARTMENT
OF PUBLIC WELFARE,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 53 Wis. 2d 650, 193 N.W. 2d 671. That opinion, pertinent sections of the trial court opinion and the interim appellate court opinion are set out in the appendix of Petition, pp. 1-20.

## JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on February 1, 1972. It affirmed the judgment of the Circuit Court of Milwaukee County on December 17, 1971, sustaining the Milwaukee County Court's (Children's Division) order of September 30, 1971, which dismissed the petition for rehearing.

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

## QUESTION PRESENTED FOR REVIEW

Have the constitutional rights of the petitioner to due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution been violated because of the refusal of the state courts to grant petitioner a rehearing on the question of the voluntariness of her consent to the termination of her parental rights to her subsequently adopted child after that question was decided by the trial court at the initial hearing and reviewed at the hearing on rehearing.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution.

2. This case involves Wisconsin Statutes sections 48.01, 48.46, 48.86 and 263.45.

## STATEMENT OF THE CASE

On July 20, 1969, petitioner gave birth to a child out of wedlock. (App. 1, 6, 15 of Petition).

On August 15, 1969, the petitioner signed a petition for order terminating her parental rights to that child. (App. 1, 6 of Petition).

On September 12, 1969, petitioner and a representative of the Milwaukee County Department of Public Welfare appeared before the Honorable George A. Bowman, Jr., Milwaukee County Court Children's Division. Upon the petitioner's request for more time, the court adjourned the matter to September 23, 1969. (App. 1, 5, 6, 7, 10, 15, 18, 19 of Petition).

On the adjourned date, after being accorded eleven days to reconsider and reflect upon her tentative decision to terminate her parental rights, the petitioner appeared before the same trial court. Present again was the same representative of the Milwaukee County Department of Public Welfare, Mrs. Joan Pascoe. Both Miss Schroud and Mrs. Pascoe were placed under oath by the court. Miss Schroud testified at the September 23, 1969, hearing before Judge Bowman that she was 21 years of age, that she had given

birth to Thomas Andrew Schroud at Columbia Hospital in Milwaukee, Wisconsin, and that after the birth of the child he was placed in the care of the Milwaukee County Department of Public Welfare. She further testified that she read and understood the *application* for termination of parental rights which she had signed. (App. 1, 15, 16 of Petition).

When asked by the trial court why she was asking to terminate her parental rights, she stated: "Because it is in mine and the baby's best interest at this time." She further elaborated that she believed the baby needed a father and that she was not able, at the time, to provide the security and the home the child needed. She stated she did not plan to marry the father of the child "right now." (App. 10, 11, 16 of Petition).

Significantly, the court then asked the petitioner, a junior in college (App. 5, 10 of Petition), if she had talked with her parents about her decision. She stated that she had and that they had agreed with her decision. She further stated she had talked with her caseworker, Mrs. Pascoe, and that Mrs. Pascoe had explained to her the nature of the termination proceedings. Petitioner stated she understood the nature of the proceedings. (App. 16, 17 of Petition).

The court then inquired of petitioner whether she understood that she would never know where her son was or with whom he was placed if the court granted the petition for termination, and petitioner stated she understood that. (App. 16 of Petition).

The court further asked whether she understood that the decision she was making was final, and she answered in the affirmative, indicating she understood she would never be able to change her mind about the decision once it was made.

She stated she had no questions and that she was willing to proceed with the termination immediately, indicating no religious preference for her son, stating she did not particularly wish him to be brought up in a Christian family. (App. 16, 17, 20 of Petition).

Mrs. Pascoe, under oath, identified herself as a caseworker for the Milwaukee County Department of Public Welfare, stating she had been caring for petitioner and her son, stating that the child was then in the care of the Milwaukee County Department of Public Welfare. She further testified that the child was adoptable and that she had advised the petitioner the nature of the termination proceedings and that she was sure she understood them. The court then, significantly, asked the caseworker: "Do you believe that her consent this morning has been freely and intelligently given?" Mrs. Pascoe stated, "Yes, I do." She further stated she knew of no reason why the petition for termination should not be granted and that her agency was willing to accept the custody and guardianship of the child. (App. 17 of Petition).

The court then concluded: "Barbara, you're in court. I am satisfied, after making a very thorough, understanding, and intelligent decision this morning, the court is satisfied that you have given fair and very serious consideration to your decision." (App. 17, 18 of Petition). The court then entered an order terminating the rights of the mother and transferring legal custody and guardianship of the child to the Milwaukee County Department of Public Welfare. (App. 1, 7, 18 of Petition).

On September 18, 1970, five days less than a full year later, the petitioner petitioned for a rehearing pursuant to the provisions of Wisconsin Statutes sec. 48.46. Wisconsin Statutes sec. 48.46 reads as follows:

> New Evidence. A parent, guardian, legal custodian or next friend of any child whose status has been adjudicated by the juvenile court may at any time within one year of

the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. Upon a showing that such evidence does exist, the court shall order a new hearing and make such disposition of the case as the facts and the best interests of the child warrant. (App. 1, 4, 7, 8, 14 of Petition).

In the unverified petition for rehearing, through counsel, the petitioner *concluded* that "new evidence has been discovered affecting the advisability of the court's original adjudication or disposition." To the petition was annexed an affidavit, subscribed and sworn to by the petitioner, *concluding* that, among other things, her consent on September 23, 1969, "was obtained under duress and by coercion." The relief asked for was that the court declare the proceedings of September 23, 1969, null and void and return custody of Thomas Andrew Schroud to the petitioner. (App. 5, 6, 7, 9, 10 of Petition).

Sometime subsequent to the termination proceedings on September 23, 1969, the child was placed with and adopted by adoptive parents. (App. 7, 11, 19 of Petition).

On September 30, 1970, there was a hearing before the same Honorable George A. Bowman, Jr., on the petition for rehearing. At that hearing, the transcript of the original hearing on termination was available, and all parties indicated that they had perused the transcript. (App. 15 of Petition).

The trial court denied the petition for rehearing, after reviewing the law in Wisconsin, the transcript of the termination hearing, and after abiding the petitioner's attempt to demonstrate the existence of new evidence justifying a rehearing. (App. 12-20 of Petition).

An appeal was then taken from Judge Bowman's order denying the petition for rehearing to the Circuit Court of

Milwaukee County, Branch No. 15, the Honorable Marvin C. Holz, presiding. The court sustained the order of the lower court. (App. 6-12 of Petition).

On February 1, 1972, the Supreme Court of Wisconsin affirmed the judgment of the Circuit Court of Milwaukee County. (App. 1-6 of Petition).

## ARGUMENT

The decision of the Wisconsin State Supreme Court does not violate the fundamental right of a litigant to a *hearing* as guaranteed under the Fourteenth Amendment of the United States Constitution.

### I. There Was A Hearing On Voluntariness Of Consent.

At issue is not petitioner's constitutional right to be *heard* on the voluntariness of her consent, but rather her alleged constitutional right to be *reheard* on the voluntariness of her consent to termination of parental rights.

As noted in *Stanley v. Illinois* (1972), — U.S. —, 31 L.Ed. 2d 551, 92 S.Ct. —, due process within the purview of the Fourteenth Amendment to the United States Constitution does not require a hearing "in every conceivable case of governmental interference or private interest," citing *Cafeteria and Restaurant Workers Union Local v. McElroy* (1961), 367 U.S. 886-894, 6 L.Ed. 2d 1230, 81 S.Ct. 1743 and *Goldberg v. Kelly* (1970), 397 U.S. 254, 263, 25 L.Ed. 2d 287, 90 S.Ct. 1011.

Even conceding, *arguendo*, that fundamental due process as encompassed in the Fourteenth Amendment requires that a party to litigation be accorded an opportunity to be *heard*, it is clear that petitioner was accorded that opportunity at

the termination hearing on September 23, 1969. At that hearing it was established that the petitioner was no longer a minor under Wisconsin Law; that she was a college student; that she had discussed the termination with her parents and her caseworker, and that both agreed with her decision to terminate; that her decision to terminate was made after she requested, and received, an adjournment; that she stated her consent was free and voluntary, and the court, after instructive questioning, so found; that the caseworker believed petitioner's consent was free and voluntary and the court so found; and that the petitioner gave reasons for wanting to terminate and affirmatively stated she recognized the *finality* of her decision once made. (See STATEMENT OF THE CASE, *Supra*).

The record is clear, if anything is clear, that petitioner had an opportunity to be heard, and was heard, at the termination hearing where the trial court, through instructive questioning, made inquiry into the voluntariness of petitioner's consent and the reasons for it.

Accordingly, the cases cited by petitioner in support of her petitioner for Writ of Certiorari are not in point and are distinguishable. Indeed, *Stanley v. Illinois* (1972), — U.S. —, 31 L.Ed. 2d 551, 92 S.Ct. —, and *Rothstein v. Lutheran Social Services of Wisconsin* (1972), — U.S. —, 31 L.Ed. 2d 786, — S.Ct. —, and *Groppi v. Wisconsin* (1971), 400 U.S. 505, 27 L.Ed. 2d 571, 91 S.Ct. 490, all represented instances where there was no *initial hearing*. Those cases represented situations where the issue was the right to be *heard*, not the right to be *reheard*.

## II. The Decision Below Does Not Conflict, In Principle, With Other Decisions On Rehearing.

On the question of petitioner's right to be reheard, that principle is settled.

A right to appeal is not essential to due process provided that due process has already been accorded in the tribunal of first instance. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District For Summit County* (1930), 281 U.S. 74, 74 L.Ed. 710, 50 S.Ct. 228, citing *McKane v. Durston* (1894), 153 U.S. 684, 687, 38 L.Ed. 867, 14 S.Ct. 913; *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Backus* (1894), 154 U.S. 421, 427, 38 L.Ed. 1031, 14 S.Ct. 1114; *Reetz v. Michigan* (1903), 188 U.S. 505, 508, 47 L.Ed. 563, 23 S.Ct. 390; *Rogers v. Peck* (1905), 199 U.S. 425, 435, 50 L.Ed. 256, 26 S.Ct. 87, and *Standard Oil Company of Indiana v. Missouri* (1912), 224 U.S. 270, 286, 56 L.Ed. 760, 32 S.Ct. 406.

Again, it has been decided that appellate review of criminal convictions is not a right guaranteed by the Constitution of the United States. *Griffin v. Illinois* (1956), 351 U.S. 12, 20, 21, 100 L.Ed. 891, 76 S.Ct. 585.

While a rehearing on terminaton of parental rights is not identical to criminal appeal, arguably if a right to appeal in a criminal case is not required by federal constitutional law, no higher standard is required in the area of family law, the latter being peculiarily in the province of the individual states under their reserved powers.

## III. The Decision Below Is Correct And Does Not Raise An Important Or Substantial Federal Question, And An Independent And Adequate State Ground Exists For It.

If federal constitutional law does not require a right to appeal, nor arguably a right to a rehearing, does Wisconsin Statutes sec. 48.46 necessarily compel it in the absence of a showing that new evidence exists affecting the advisability of the court's original adjudication or disposition?

Wisconsin Statutes sec. 48.46 clearly and unequivocally spells out the *sine qua non* of rehearings. The State of Wisconsin has a "countervailing state interest of overriding significance" (*infra*) requiring strict construction of Wisconsin Statutes sec. 48.46. Rehearing requirements under that section of the statutes are compatible, moreover, with rather stringent requirements in the Wisconsin criminal law before motions for new trial on grounds of newly discovered evidence are granted.

In *State v. Clark* (1967), 36 Wis. 2d 263, 153 N.W. 2d 61, the Wisconsin State Supreme Court enumerates the criteria governing granting a new trial on the basis of newly discovered evidence in criminal cases, which they state are the same as in a civil case. Citing *Lock v. State* (1966), 31 Wis. 2d 110, 117, 142 N.W. 2d 183, the requirements were enumerated:

1. The evidence must have come to the moving party's knowledge after a trial;

2. The moving party must not have been negligent in seeking to discover it;

3. The evidence must be material to the issue;

4. The testimony must not be merely cumulative to the testimony which was introduced to the trial; and

5. It must be reasonably probable that a different result would be reached on a new trial.

Accord, *Price v. State* (1967), 37 Wis. 2d 117, 154 N.W. 2d 222; *State v. Herfel* (1971), 49 Wis. 2d 513, 521, 522, 182 N.W. 2d 232, 237; *State v. Chabonian* (1971), 50 Wis. 2d 574, 185 N.W. 2d 289; *Simos v. State* (1972), 53 Wis. 2d 493, 192 N.W. 2d 877; *State v. Bailey* (1972), 54 Wis. 2d 679, 196 N.W. 2d 664.

Wisconsin Statutes sec. 48.46, in appropriate part, and the Wisconsin criminal cases just cited are compatible and evince a uniform state policy with reference to the granting of new trials on the grounds of newly discovered evidence which probably affect the original disposition or adjudication.

Based on this authority, and in the absence of a satisfactory showing of newly discovered evidence, after an opportunity was given to make such a showing at the hearing on the petition for rehearing, it is clear that the decision below is correct. There was not an automatic right to a rehearing, particularly after petitioner was once heard on the same issues at the termination hearing, and in the absence of a satisfactory showing that new evidence existed affecting the original adjudication or disposition entered at the original termination hearing.

Moreover, the petition for Writ of Certiorari should be denied because no important or substantial federal question is involved. Indeed, whether there was a satisfactory raising of a federal question in the state courts is put in doubt by *Beck v. Washington* (1962), 369 U.S. 541, 8 L.Ed. 2d 98, 82 S.Ct. 955. The petitioner does not appear to have argued the constitutional contention in her brief, as opposed to merely

setting it forth in her brief, and the Wisconsin Supreme Court seems, in any event, to have avoided the federal issue assuming, arguendo, that it was properly raised by petitioner by a brief, or otherwise, in the Wisconsin Supreme Court.

Submitted, the Wisconsin State Supreme Court decision is predicated on an independent and adequate state ground, in turn based on a "countervailing state interest of overriding significance." *Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780.

The Wisconsin State Legislature in the Children's Code, Chapter 48 of the Wisconsin Statutes, makes it clear that it is a compelling state interest of overriding significance that children who have been placed in adoptive homes and have been adopted are not to be interfered with by their natural parents once they are legally established in those homes. Wisconsin Statutes sec. 48.01 (1) and (2) (f) and 48.01(3) read as follows:

> 48.01 Title, Intent and Construction of Chapter. (1) Title. This chapter may be cited as "the Children's Code."
> (2) Intent. It is declared to be the intent of this chapter to promote the best interests of the children of this state through:
> (f) Assurance for children needing adoptive homes that they will be placed in the best home available; protection of children from adoption by persons unfit to have responsibility for raising a child; protection for children who are legally established in adoptive homes from interference by their natural parents.
> (3) Construction. This chapter shall be liberally construed to effect the objectives in sub. (2). The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child and the interest of the public.

The strong public policy against belated interference with lawful orders of adoption is clearly seen in Wisconsin Statutes sec. 48.86, Withdrawal of Consent:

> Withdrawal of any consent filed in connection with a petition for adoption hereunder shall not be permitted, except that the court, after notice and opportunity to be heard is given to the petitioner in the adoption proceedings, to the person seeking to withdraw consent and to any agency participating in the adoption proceedings, may, if it finds that the best interests of the child will be furthered thereby, issue a written order permitting the withdrawal of such consent. The entry of an order of adoption renders any consent irrevocable.

The people of Wisconsin, through its legislature, have manifested a compelling and transcendent state interest with respect to state rules of procedure to the end that orders of adoption, and placement of children with adoptive parents, are not interfered with by natural parents. To that end, the Children's Code clearly provides for termination of parental rights procedure. In this instance, that procedure was scrupulously followed by the trial court at the termination hearing. And in Wisconsin Statutes sec. 48.46, the Wisconsin Legislature has clearly provided for a rehearing procedure which requires a showing that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. An opportunity to make such a showing was given petitioner, but three Wisconsin courts have held that a satisfactory showing was not made.

Were those rulings based on an independent and adequate state ground?

Clearly, the best interest of an adopted child, as best interest is to be liberally construed under the Children's

Code, is that they be free "from interference by their natural parents." Wisconsin Statutes sec. 48.01 (2) (f).

To be free from that interference after there has been an order of termination and an order of adoption, the State of Wisconsin is free to require a *strong* showing that new evidence exists warranting a rehearing and a potential interference with the placement of an adopted child.

The Wisconsin Supreme Court, and the intermediate appellate court found that the unverified petition of counsel and the affidavit of the natural mother were not a sufficient *evidentiary* showing that newly discovered evidence existed which would affect "the advisability of the court's original adjudication or disposition." That decision is almost inescapable, based on the transcript of the proceedings, if Wisconsin Statutes secs. 48.01, 48.46 and 48.86 are to be reconciled.

The public policy argument supporting the decision below is spelled out in Justice Robert W. Hansen's concurring opinion in *State ex rel. Lewis v. Lutheran Social Services* (1970), 47 Wis. 2d 420, 437, 178 N.W. 2d 56, which, in pertinent part, reflects upon the state interest in *finality:*

> There is sound public policy involved in the statutory insistence that appeals from orders affecting the future life and well-being of children be made within a forty-day period. The majority opinion states well the tragic consequences of time-consuming delays in the proper, prompt and permanent placement of illegitimate children in stable home surroundings with adoptive parents. It is bad enough that the disposition of criminal prosecutions is delayed for months and years. It is sad enough that crowded court calendars delay trials of personal injury actions for even longer. At least the legislature has sought to avoid similar delays in the appeals of orders

> entered under the authority of the Children's Code. There is no good reason why a petitioner who has elected not to appeal a county court order denying his claim of rights as a "putative father" should be permitted to evade the forty-day limit on children's court appeals by much later seeking a writ that is a clear attempt to review and reverse the county court order which can no longer be appealed. So I would deny the writ. In fact, I would not have entertained it in the first place.

In *Labine v. Vincent* (1971), 401 U.S. 532, 538-40, 28 L.Ed. 2d 288, 294, 91 S.Ct. 1017, Mr. Justice Black, for the majority, opines:

> But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State. . . . In short, we conclude that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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